10-18-2012

State v. Pokorney Appellant's Reply Brief Dckt. 38652

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38652
	)	
v.	)	
	)	
RICHARD DAVID POKORNEY,	)	
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL MCLAUGHLIN
District Judge

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I.

THE DISTRICT COURT ERRED WHEN IT REFUSED TO APPOINT SUBSTITUTE COUNSEL, OR, IN THE ALTERNATIVE, THE COURT ERRED WHEN IT FAILED TO HOLD A PROPER HEARING IN RESPONSE TO MR. POKORNEY'S REQUEST FOR SUBSTITUTE COUNSEL

First of all, the state is just wrong in its assertion that Appellant does not challenge the district court's findings that there was no ineffective assistance of counsel or an actual conflict of interest. In his opening brief Appellant argues that the district court's rulings denying substitute counsel were erroneous because there was good cause. The lying, threatening and colluding and actions/inactions of counsel described in Mr. Pokorney's letters are more than sufficient to establish either ineffective assistance of counsel or an actual conflict of interest. Therefore, as already argued, the failure to find good cause on those facts (taking them as true) is error.

But in addition, Appellant in his opening brief also separately and independently challenges the ruling where the court finds there is no conflict of interest and therefore denies the request for substitute counsel. Appellant specifically argues that the court's ruling denying substitute counsel is erroneous and must be reversed because the court applied the wrong legal standard.

The state is likewise wrong when it claims that the court's ruling, to wit, even taking every bit of the letters as true they do not constitute good cause to remove counsel, was an alternate grounds for denying the motion for substitute

counsel. The state claims that instead, the primary grounds of denying the motion were the court's earlier rulings that the attorney was not ineffective and also, does not have a conflict with Mr. Pokorney. But those were also the exact grounds that the court was addressing with its later ruling, it was just expounding on its factual findings (really, the lack thereof).

To further explain, earlier, the court had ruled that Mr. Pokorney was not entitled to substitute counsel, but this was based on only general findings. The court did not make findings on the many, many, many, facts asserted by Mr. Pokorney in the 16 pages of his two letters. When the court was taken to task about its failure to hear Mr. Pokorney's arguments regarding those facts (more on this below), the court stated that even taking them as true, they still did not constitute good cause for substitute counsel.

In other words, the first ruling found that under the facts alleged Mr. Pokorney was not entitled to substitute counsel, and in the second ruling the court found that under the facts alleged Mr. Pokorney was not entitled to substitute counsel. These are the same rulings, there is no alternative grounds used to deny the motion. The only difference is that in the first ruling the court did not elaborate on its factual findings because it did not discuss them, and in the second, the court did not elaborate on its factual findings because it used the technique of assuming them to be true. But again, both rulings are that Mr. Pokorney's is not entitled to new counsel based on the facts as alleged.

Back to Appellant's argument, if the facts as asserted by Mr. Pokorney are true, they indisputably require substitute counsel to be appointed. Since the

court assumed them to be true and still didn't provide substitute counsel, it clearly erred, and the state has not even attempted to argue otherwise, presumably because it cannot be so argued. Therefore, the court's ruling on the substitution of counsel issue must be reversed.

But even assuming arguendo that the state is correct and the earlier rulings of the district court were somehow independent rulings unaffected by the court's later explanation concerning the facts it was using for its ruling, this still does not help the state. This is because the state has also not attempted to contest Appellant's claim that the district court used the incorrect legal standard in the earlier ruling, which also requires reversal.

Next, the state incredibly argues there was no breakdown of communication and that Mr. Pokorney never claimed there was. First as to this, Mr. Pokorney twice discharged this particular attorney and there can be no more complete or irrevocable breakdown of communication than actually not having an attorney-client relationship anymore.

Second, even if Mr. Pokorney had not discharged the attorney, the state is also wrong in its assertion that Mr. Pokorney had to claim that the attorney was not communicating with him in order to establish a total breakdown of communication. Rather, it is the breakdown of communication, and not direction of the breakdown, which results in a Sixth Amendment denial of counsel.

As already set forth in Appellant's opening brief, the Tenth Circuit case of *United States v. Lott*, 310 F.3d 1231 (10th Cir. 2002) (also cited in Respondent's brief), explains as follows:

> "Even if a defendant's counsel is competent, a serious breakdown in communication can result in an inadequate defense." *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000). A defendant who cannot communicate with his attorney cannot assist his attorney with preparation of his case, including suggesting potential witnesses to call and trial strategies to pursue, discussing whether the defendant himself should testify, and helping formulate other bread-and-butter decisions that can constitute the core of a successful defense. A trial court's failure to appoint new counsel when faced with a total breakdown in communication may thus constitute a denial of counsel in violation of the Sixth Amendment.

Id., p. 1251 (emphasis added, footnote omitted).

In short, there is no requirement that it be alleged the attorney is not communicating with the client, it is enough that the client cannot communicate with the attorney. And here, it cannot be seriously argued that Mr. Pokorney could communicate with the attorney since he undisputedly would have nothing to do with him.[1]

Finally as to this, the state is also incorrect in its complaint that since Mr. Pokorney did not claim a breakdown of communication, the district court did not error by not finding one. It was the court who characterized the issues that Mr. Pokorney was having with his attorney, not Mr. Pokorney. (Tr. 8/20/2010, p. 15.)

The state points to no law that requires a defendant who is attempting to obtain substitute counsel (and who is for that reason necessarily making the argument himself and not with the assistance of counsel), to be able to precisely use the legal phrase that there is a total breakdown of communication. Rather, what the defendant needs to do (and which Mr. Pokorney tried to do), is to

[1] Appellant also notes that it cannot be seriously suggested that berating the attorney and writing to him in attempt to keep him off of his case is communicating with him as contemplated by the Sixth Amendment.

describe the problems he is having with his counsel, it is then up to the court to apply the applicable law.

The state also complains that Appellant has cited no legal authority for the proposition that a defendant must be given a chance to "discuss" his allegations. Even ignoring that discussion or argument is the very thing which is supposed to happen at a motion hearing (and the district court had promised Mr. Pokorney a hearing on the substitute counsel issue), Appellant has already in his opening brief provided the law explaining what a district court must do.

As the Court of Appeals explained in *State v. Lippert*, 276 P.3d 756 (Ct. App. 2012):

> The trial court must afford the defendant a full and fair opportunity to present the facts and reasons in support of a motion for substitution of counsel after having been made aware of the problems involved.
>
> The trial court must conduct a meaningful inquiry to determine whether a defendant possesses good cause for his or her request for substitute counsel. Specifically, the district court must make some reasonable, nonsuggestive efforts to determine the nature of the defendant's complaints and to apprise itself of the facts necessary to determine whether the defendant's relationship with his or her appointed attorney has deteriorated to the point that sound discretion requires substitution or even to such an extent that his or her Sixth Amendment right would be violated but for substitution. Even when the trial court suspects that the defendant's requests are disingenuous and designed solely to manipulate the judicial process and to delay the trial, perfunctory questioning is not sufficient.

Id., p. 759 (internal citations omitted).

It cannot be said that the district court in our case gave Mr. Pokorney the full and fair opportunity described above. The first time Mr. Pokorney tried to voice his complaints, the court stopped him and sent him off for a competency

evaluation. The second time the court cut off all discussion about what happened by claiming it was taking the allegations as true for the analysis.

What the court needed to do was to listen to Mr. Pokorney's complaints, particularly since he had already discharged this same attorney and defended himself in a jury trial and so this was anything but a casual or fleeting complaint by a defendant. Or if the court didn't want to resolve the factual issues, it could have actually taken his allegations as true, which would have resulted in substitute counsel if the law was followed. But the court did neither, it did not listen to him and instead cut off Mr. Pokorney's arguments about his allegations by stating it was taking them as true, and then still didn't appoint substitute counsel.

To summarize, the state has not even attempted to seriously dispute Appellant's challenges to the court's rulings which are clearly erroneous, and basically just ignores relevant rulings or claims they are not being challenged. So for all the reasons in Appellant's opening brief, Appellant continues to assert that the court's denial of substitute counsel must be reversed.

III.

THE COURT ERRED WHEN IT REFUSED TO ALLOW MR. POKORNEY TO RECALL AND IMPEACH WITNESSES

Once more, that state does not attempt to argue that the court's ruling was correct, to wit, that a civil rule precluded Mr. Pokorney from recalling a witness for

the purpose of impeaching him. Instead, the state argues only that the order of presentation of witnesses is an administrative decision within the discretion of the trial court.

Appellant does not dispute the general authority of a court to order the presentation of witnesses. But that is not happened here, the court didn't change the order of witnesses, it flat out refused to allow Mr. Pokorney to address an entire area of questioning in a criminal case expressly and repeatedly based on a rule of civil procedure. This was clear error, which as explained below, was not harmless.

But also, Appellant in his brief alternatively argued at length that assuming some other limitation on the calling or confronting witnesses applies, the district court still abused its discretion under the circumstances. The state never responds to that argument and Appellant still asserts that the court's ruling must be reversed as explained in Appellant's opening brief.

The state does address the Sixth Amendment issues, to wit, that Mr. Pokorney's right to confront and right to present a complete defense were violated when the court precluded him from presenting relevant evidence. The state does not dispute that the proffered evidence was relevant. Rather, it argues only that the court did not abuse its discretion by denying the request to recall the witness because any problem was Mr. Pokorney's fault.

The state correctly explains that Mr. Pokorney did not understand, when promised by the court that he could call R.P. the next day, that this did not mean he could examine him about his prior testimony. Of course, the court did not

actually say at that time he could not examine him like that, so the state argues that Mr. Pokorney cannot rely on his ignorance of the proper procedure for examination and cross-examination and that a pro se litigant is held to the same rules as attorneys.

But the rule preventing such examination is a civil rule which does not apply to examination and cross examination in a criminal case and so Mr. Pokorney cannot be faulted for his ignorance of a rule which does not apply. Even if he may not justifiably be ignorant of the court's general authority to control the order of examination, this is a far cry from faulting him for not knowing, as the state suggests, that the court's general authority will allow it to apply the bright line rule from civil cases which states that a witness once examined may not be examined about the same matter.

In other words, even assuming for the sake of argument that trial judges can and do commonly control the examination of the witnesses in criminal cases in the same manner as the civil rule provides, that changes nothing here. While a pro se litigant may well be held to the same rules as an attorney, this is not a rule of criminal procedure that could be ascertained by a pro se defendant (or even an attorney inexperienced in trial practice for that matter). The rule is not in the Idaho Criminal Rules and so a complete reading of them would not alert the defendant. If for some reason the defendant were to read the Idaho Rules of Civil Procedure and stumble upon the rule, negative inference would actually lead him to believe that it does not apply in a criminal case since it is not also a criminal rule.

The case cited by the state it its brief, *State v. Johnson*, 132 Idaho 726, 979 P.2d 128 (Ct.App. 1999), only makes the general statement that the court can order presentation of witnesses and that case concerned taking witnesses out of order to accommodate them, not the exclusion of the testimony. So even if the defendant was aware of the caselaw (or the relevant rule of evidence) establishing the court's general authority, this in no way would alert the defendant that his cross examination cannot be completed later after he gets the impeachment materials (that he did not know he needed because the trial schedule was discussed ex parte) from his jail cell.

Thus, the state cannot rely here on Mr. Pokorney's ignorance of a civil rule which does not apply to argue he was not deprived of his Sixth Amendment rights. Rather, the court deprived him of those rights by depriving him of the opportunity for full cross examination by leading him to believe he could later finish it and then invoking an inapplicable rule to prevent it. But even if the court is considered to have merely invoked an informal procedure allowed under its general authority, it still abused its discretion under these circumstances, which include the reasons Mr. Pokorney had not finished his cross examination as well as the court's failure to make any actual findings supporting its apparent ruling that the interest of the witness in not being recalled outweighed Mr. Pokorney right to present indisputably relevant evidence.

Finally, the error was not harmless. The state first argues that since the court's ruling was limited to recalling R.P. who testified only as allegations concerning himself, that any error is harmless regarding the conviction on the

other count concerning W.P. This is not correct. This was a case of credibility, so if the jury learned that one witness changed his story from trial to trial, it cannot be said beyond a reasonable doubt that the jury still would have convicted the defendant on a count concerning another witness.

Next, despite the battle with the court over the impeachment issue, Mr. Pokorney was able to give one specific example of how he wanted to impeach R.P. with his prior testimony. Mr. Pokorney said that he was "going to ask him about his statement that he has his clothes off, because in the earlier---" and then the court cut him off.

The state argues that any error is harmless because R.P. did not testify that his clothes were off. Rather, he testified that he went to his parents' bed with clothes on but that his pants were "pulled down" when Mr. Pokorney rubbed his genitals on him. The state argues that since R.P. just testified that his pants were pulled down, and not that his clothes were off, the offer of proof mischaracterizes R.P.'s testimony and there is nothing in the record to suggest that he could be effectively impeached (and so an acquittal would not have resulted).

Besides unfairly picking nits about the words used by Mr. Pokorney, who was not even able to finish his sentence before being cut off by the court, the state ignores the portion of the record which shows us exactly how R.P. would be very effectively impeached. In the original trial transcript (which is part of our record), R.P. testified:

A. He was rubbing up against me.

Q. Okay. And what part of your body was being rubbed?

A. My private.

Q. Was your private with clothes on or your private with no clothes on?

A. On.

Q. On? And what part—and who was rubbing against you?

A. My dad.

Q. What part of dad's body was rubbing up against your private?

A. His private.

Docket 34945, Tr. p. 201, ln. 25—p. 202, ln. 12 (emphasis added).

So in the instant trial R.P. testified that his pants were pulled down when Mr. Pokorney was allegedly rubbing on him but in the original trial he testified to the direct opposite.

The importance of this impeachment cannot be overstated because it must be remembered there were two counts concerning R.P. and the jury could only reach a verdict as to one. Since the jury obviously already had some problems with R.P.'s testimony, had it known that he had earlier testified differently on this point, it cannot be said beyond a reasonable doubt that the jury would have convicted him on this, or any, count. Thus, the state has failed in its burden of proving the error harmless.

CONCLUSION

For all the reasons in this and Appellant's brief, Mr. Pokorney requests this Court reverse and vacate his convictions because there was insufficient evidence

to support them. Alternatively, Mr. Pokorney requests this Court vacate his convictions because of the failure to appoint substitute counsel and remand this case for a new trial with substitute counsel. Finally, he requests the convictions be vacated because he could not recall and impeach witnesses.

DATED this 18th day of October, 2012.

Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by the method as indicated below:

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